



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

labor and make any profit for himself, or his wife and family, his creditors may subject it to liability for the payment of their claims. . . . And as the law will not allow him directly to secure the profits of his future labor to himself in exclusion of the claims of his creditors, it will not allow him indirectly to do the same thing, by securing such profits to his wife or family; at least *quoad* his existing creditors," (p. 528). In other words, as is clearly indicated throughout the opinion, the endeavor to indirectly bestow his earnings upon his wife gives *existing* creditors the right to subject such earnings, under the statute of voluntary conveyances, whether actually fraudulent or not. Similar principles are laid down in *Bogges v. Richards*, 39 W. Va. 567 (45 Am. St. Rep. 938); *Glidden v. Taylor*, 16 Ohio St. 509 (91 Am. Dec. 98); and *Shackelford v. Collier*, 6 Bush, 156. See also *Wait on Fraud. Conv.*, sec. 26; *Schouler on Husband and Wife*, sec. 272. In *Burt v. Timmons*, 29 W. Va. 441 (6 Am. St. Rep. 664), it was held that creditors might subject the value of a house built upon the wife's real estate, the cost of which was paid by the husband. In some of the States a distinction is drawn between *services and work* on the one hand, and *money* expended on the other—denying the right to subject the value of the former, while conceding it in the latter case. *Nance v. Nance*, 84 Ala. 375 (5 Am. St. Rep. 378); *Abbey v. Deyo*, 44 N. Y. 344; *Voorhees v. Bonesteel*, 16 Wall. 31 (local law of New York applied); *Aldridge v. Muirhead*, 101 U. S. 397 (local law of New Jersey applied); *Osborne v. Wilkes* (N. C.), 13 S. E. 285. The subject is discussed at length in 43 Cent. L. J. 444.

Many cases holding apparently *contra*, were attempts to subject, *at law*, the proceeds of the husband's skill and labor in connection with the wife's property; others required actual proof of fraudulent intent, either because the debts were after-created obligations, or there was no statute of voluntary conveyances upon which the creditor could rely. See *Lewis v. Johns*, 24 Cal. 98 (85 Am. Dec. 48); *Webster v. Hildreth*, 33 Vt. 457 (78 Am. Dec. 632); *Feller v. Allen*, 23 Wis. 301 (99 Am. Dec. 173); the distinction between the legal and the equitable right being commented upon in the last case cited.

PRESTON V. KINDRICK.*

Supreme Court of Appeals: At Wytheville.

July 8, 1897.

1. CHANCERY JURISDICTION—*Relief against decree obtained on a false return of an officer.* A court of equity cannot grant relief against a decree by default rendered against a defendant on the ground that no process was served on him, where the return of the officer and the recitals of the decree show that process was served on the defendant, unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception.
2. DECREES AND JUDGMENTS—*Absence of process—Notice of proceeding—Valid defence.* Although no process was served on a defendant he is not entitled to

* Reported by M. P. Burks, State Reporter.

relief from a decree against him in the absence of proof that he did not have actual notice of the proceedings before the decree was rendered, and that he had a meritorious defence.

3. DECREEES AND JUDGMENTS—*Jurisdiction of parties and subject—Void decrees—Case at bar—Sec. 3451 of Code—Injunctions.* Where a court has jurisdiction of the parties and of the subject-matter of a suit, and does not exceed its jurisdiction, its decrees are not void. In the case at bar if the decree complained of was erroneous it could have been corrected by appropriate proceedings under sec. 3451 of the Code. Injunction was not the appropriate proceeding.

Appeal from a decree of the Circuit Court of Washington county, pronounced May 22, 1896, in a suit in chancery wherein the appellee was the complainant, and the appellant and others were the defendants.

Reversed.

The opinion states the case.

Daniel Trigg, for the appellant.

J. S. Ashworth, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

In the year 1892 the appellant filed his bill in the Circuit Court of Washington county to subject a parcel of land to the purchase price thereon from one Bratton, to whom he had sold it. The bill alleged that Bratton had assigned his contract of sale to Mrs. Kindrick, one of the appellees. Both were made parties defendant to the bill. Neither of the defendants appeared, and a decree was entered taking the bill for confessed, in which it was recited that it appeared to the court that all the defendants had been duly served with process. A sale of the land was directed and made, reported to the court, and confirmed. The proceeds of sale were not sufficient to pay the entire purchase money, and a decree was entered against Bratton and Mrs. Kindrick for the residue thereof, and the cause stricken from the docket at the October term of the court, 1892.

In June, 1895, Mrs. Kindrick filed her bill to enjoin the collection of that sum, and also to set aside and annul the decrees under which the land was sold, allow her to pay the purchase money due thereon, and for general relief. The ground upon which she based her right to relief was that she had no notice of the suit or sale, and that the return of the sheriff showing that he had executed process upon her was false, and a fraud upon her, and that the appellant, the plaintiff in that suit, and the purchaser of the land, had notice that she was igno-

rant of the suit, and of the proceedings had therein. Preston answered, and denied all notice, as did Naff, to whom Preston had sold the land. The sheriff was made a party, but no answer was filed by him. Answer under oath was waived as to all the defendants. Mrs. Kindrick, whose deposition was objected to, testified that no process was served upon her. No proof was taken to sustain the allegations of her bill that she had no actual knowledge of the suit, or of the proceedings thereon, or that Preston had any knowledge that process had not been served upon her, or that he knew that she was ignorant of the suit, or of the proceedings therein, as she alleged.

The Circuit Court held that no process had been executed upon Mrs. Kindrick, and granted the relief prayed for.

The question involved in this appeal is the right of a party to go into a court of equity to obtain relief against a decree rendered in a cause to which he was made a party, on the ground that no process was served upon him, when the process appears to have been executed by the return of the sheriff, and by the recital in the decree of the court taking the bill for confessed.

The decisions of the courts upon this question are conflicting, and the reasoning of the judges is not entirely satisfactory upon either side.

One line of cases holds that a party who has been injured by a judgment rendered in his absence may have relief in equity if he can succeed in showing that he was not summoned, and did not hear of the proceedings in time to make defence or to obtain a new trial, and that he has a meritorious defence. *Freem. on Judgm.*, sec. 495.

Another class of cases holds that a court of equity cannot grant relief in such a case unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception; thus likening the case to those cases in which the defendant has been prevented from setting up his defense by the trickery or fraud of his adversary.

The rule of this latter class of cases is perhaps the better doctrine.

The risk of opening a judgment or decree on an allegation which, like that of the failure to serve process, or the want of notice, depends upon the uncertain testimony of witnesses, is so great that the injured party should be left to his remedy in the same case where relief can be had in that case, or to his remedy against the officer who has made the false return, unless that return was in some way procured or induced by the plaintiff, or he is in some way responsible for the defendant's want of notice of the suit, or of the proceedings therein.

Counsel for the parties have not cited any decision of this court upon this precise point, nor have we, in our examination, been able to find such a case.

In *Goolsby v. St. John*, 25 Gratt. 146, 156, where it did not appear affirmatively from the return that summons had been served in the manner prescribed by law, Judge Moncure said, in discussing that question, that "if the summons had been executed in the manner prescribed by law, and that fact had appeared by the return made thereon by the sheriff, then the judgment would have been conclusive, even though the defendants may not have had actual knowledge of the existence of the action before the judgment was rendered."

Such a judgment is sustained, not because a judgment rendered without notice is good, but because the law will not permit any proof to weigh against that which the policy of the law treats as absolute verity, and remits the party injured to his remedy at law against the person by whom the record was falsified.

The presumption that the powers committed to judicial tribunals of general jurisdiction have been properly exercised is essential to the repose and safety of society, and the inconvenience of allowing it to be met and overcome by parol evidence is greater than any benefit that could be derived from a different source. Public safety demands that when such a tribunal has pronounced judgment its adjudication on that subject shall be as conclusive on the question whether the defendant was duly notified as on any other point essential to the determination of the cause. 1 Smith's Lead. Cas. 1119, 1127, etc.

This question was before the Supreme Court of the United States in the case of *Walker v. Robbins*, 14 How. 584, and that court held that a bill in chancery would not lie for the purpose of perpetually enjoining a judgment upon the ground that there was a false return in serving process upon one of the defendants. Mr. Justice Catron, in delivering the opinion of the court, said: "Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill in this case be maintained? The respondents did no act that can connect them with the false return. It was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from controversy. Still the marshal's responsibility does not settle the question made by the bill, which, in general terms, is whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law when

there has been an abuse in the various details arising on execution of process original, mesne, and final. If a court of chancery can be called upon to correct one abuse, so it may to correct another, and, in effect, to vacate judgments, where the tribunal rendering the same would refuse relief, either on motion or on a process by *audita querela*, where this mode of process is in use. In cases of false return affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made; and, if relief cannot be had there, the party injured must seek his remedy against the marshal."

The same question came before that court again in the case of *Knox County v. Harshman*, 133 U. S. 152. In delivering the opinion of the court in that case, Mr. Justice Gray said: "The officer's return stated that he served a copy of the summons upon the clerk. If that return were false, no fraud being charged or proved against the petitioner, redress could be sought at law only, and not by this bill."

But, even if it were held that, in order to obtain relief against the proceedings complained of, it was only necessary for Mrs. Kindrick to show that process was not served upon her, and that she did not have actual notice of the proceedings before the decrees complained of were entered, and that she has a meritorious defense, she has not made out her case. Although she alleges in her bill that she did not have actual notice of the suit and proceedings therein until after the decrees complained of were rendered, she has wholly failed to sustain it by proof.

It is insisted that the bill in the case of *Preston v. Kindrick, &c.*, did warrant the court in rendering a personal decree against Mrs. Kindrick for the residue of the purchase price of the land remaining unpaid after crediting upon it the proceeds of sale, and that as to this sum the court was clearly without jurisdiction, and its decree is void. Conceding that the pleadings and proof in that case did not authorize a decree against her for that sum, it was a mere error of the court. The court had jurisdiction of the parties and the subject-matter. It did not exceed its jurisdiction in rendering a personal decree against Mrs. Kindrick; it only committed an error, for which relief could have been had under sec. 3451 of the Code—a remedy which was still available to Mrs. Kindrick when the bill in this case was filed.

We are of opinion that the decree complained of should be reversed, and the bill dismissed.

Reversed

NOTE.—The point decided in the principal case, that where a judgment or decree is entered against a defendant, upon whom process appears to have been duly

served, both by the return of the officer and the recital thereof in the record, a court of equity will not entertain a bill to impeach the proceeding on the ground that no notice was in fact served, is of much practical importance and one which has been the source of much judicial contention. There is much to be said on both sides, and there are few clear-cut questions of law in which the arguments in favor of either view seem to be so evenly balanced. On the one hand it may be said that where the plaintiff, himself innocent of wrong-doing, has secured his judgment according to all the prescribed forms of law, in the proper court and upon proper evidence of due notice to the defendant (the return by a sworn officer in the line of his official duty), any rule which would permit such a judgment to be afterwards overturned by uncertain *aliunde* testimony, contradictory of the record, would not only be a great hardship upon the plaintiff, but would make a serious inroad upon the sanctity of judicial records, and open wide the door for fraud and perjury. The case becomes all the stronger when innocent third persons have acquired rights in reliance upon the judgment. But, on the other hand, the principle that every man is entitled to his day in court, and that no man is bound by a personal judgment in a proceeding of which he has had no notice, actual or constructive, and which he has had no opportunity to defend, is so deeply rooted in our jurisprudence and so carefully guarded by constitutional and legislative enactments, that many, probably a majority, of the American courts have repudiated the view announced in the principal case, as depriving the citizen of his property without due process of law.

The editor of the American Decisions, in a note to *Taylor v. Lewis* (Ky.), 19 Am. Dec. 135, in commenting on that case, and the later case of *Walker v. Robbins*, 14 How. 584, makes this vigorous assault upon the doctrine of those cases: "The rule stated in the principal case that a judgment cannot be impeached in equity as fraudulent and void, when it appears that the officer, without combination with the plaintiff, has returned the process as served on the defendant, when in fact the same never was served, can hardly be considered the prevailing rule at the present day. A few decisions are found affirming the same, but most of the modern authorities are opposed thereto. . . . It has never been questioned that one branch of the jurisdiction of courts of equity was to grant relief in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other courts. Story's Eq. Jurisp., sec. 184. It would seem to be one of those self-evident axiomatic propositions that might be safely asserted without fear of successful contradiction, that no greater fraud can possibly be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in its defense. To do so is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might, and not right, prevails. Yet the authorities just quoted undoubtedly have that effect, for when it is asked, and that, too, of those marvels of wisdom and guardian angels of the rights of persons, courts of equity, to relieve against the commission of such an outrage—fraud *per se*, it might truthfully be said—and to prevent one man through the medium of courts of justice from confiscating the property of another, their answer is, in as much as you have a cause of action against the officer for making a false return, we will deny you the relief sought, allow the Constitution to be violated, and your property confiscated. Fortunately, however, the authorities quoted have not been

followed in this country. A contrary rule prevails, and a judgment at law may be vacated or relieved against in equity, when it is made to appear that it is unjust, and that the court in pronouncing it acted without jurisdiction." The learned editor cites an elaborate array of authorities to sustain the position.

In Black on Judgments, the doctrine is thus stated: "Equity may vacate or enjoin the judgment of a court of law, when it is shown to be unjust and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it in consequence of a false return of the service by the sheriff or other officer. . . . It should be remarked that there is a line of decisions wherein the application of the rule above stated is materially restricted. These cases hold that equity should not grant relief unless the false return of service was procured or induced by the plaintiff, or unless the latter can be in some way connected with the deception, thus linking the case supposed with the category of those wherein the defendant was prevented from setting up the defense by trickery or fraud of his adversary. The analogy here presented is plausible, but deceptive. For in case the plaintiff is in no fault, and the officer is alone to blame for the false return, these decisions can suggest no remedy except that the defendant should pay the judgment and then bring his action against the officer. Practically, however, this remedy must often be illusory. And, at its best, it involves a circuitry and remoteness of obtaining redress which is foreign to the spirit of equity." 1 Black on Judg. 377.

In a recent Colorado case, involving the same question, the court adopted a similar view, saying in the course of a well-considered opinion: "It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant, and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose) void, and that all sales, or other proceedings had thereunder, are, as to all persons, irrespective of notice or *bona fides*, absolute nullities. . . . The provision of the statute [as to service on the general agent of a corporation] is simply a declaration of that principle always maintained by the courts, that a person cannot be prejudiced or his rights of person or property affected, without notice, actual or constructive. So jealous have the people been of the maintenance of this principle that it has been ingrafted into both the Federal and the State Constitutions, and that constitutional requirement of due process of law extends to all proceedings, judicial and administrative. The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not 'due process of law,' and is not according 'to the law of the land.'" *Great West Mining Co. v. Mining Co.*, 12 Col. 46 (13 Am. St. Rep. 204).

Subsequent to the case of *Walker v. Robbins*, 14 How. 584, cited in the principal case, the same question came before the Supreme Court of the United States in *Earle v. McVeigh*, 91 U. S. 503. In that case the sheriff's return recited due service, according to the Virginia statute, by posting the summons at the front door of the defendant's usual place of abode, "neither he, nor his wife, nor any white person who is a member of his family and above the age of sixteen years being

found at his said usual place of abode." Judgment was entered in default of defendant's appearance. A chancery suit was then instituted to subject the defendant's real estate to the lien of the judgment, and the defendant was summoned by publication as a non-resident. A decree of sale was had, but before it was executed defendant filed a bill to enjoin the sale and to set aside the judgment as being void—alleging a false return, in that the house, upon the front door of which the summons had been posted, was not his usual place of abode. Without noticing the previous case of *Walker v. Robbins* (*sup.*), the court unanimously held the case a proper one for equitable relief. Mr. Justice Clifford, in the course of his opinion, laid stress upon the right of every judgment defendant to question the jurisdiction of the court, and upon the necessity of service of process as a prerequisite to jurisdiction. "Argument," says he, "to show that no person can be bound by a judgment, or any proceeding conducive thereto, to which he was never a party or privy, is quite unnecessary, as no person can be considered in default with respect to that which it was never incumbent upon him to fulfill. Standard authorities lay down the rule that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. *Borden v. Fitch*, 15 Johns. 141. Notice to the defendant, actual or constructive, is an essential prerequisite of jurisdiction. . . . Viewed in any light, it is plain that the case falls within the rule that the service of process, by posting a copy on the door of a dwelling house, is not a good service, if it appears by competent evidence that the house was not the usual place where the defendant or his family resided at the time the notice was posted. . . . No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense is a maxim of universal application; and it affords the rule of decision in this case."

The opinion of Rapallo, J., in *Ferguson v. Crawford*, 70 N. Y. 253 (26 Am. Rep. 589), contains a masterly review of the whole question of the right of a defendant to contradict jurisdictional recitals in the record. Referring to the argument that the defendant is estopped to assert anything against the allegation in the record of service or appearance, the opinion quotes the following striking extract from *Starbuck v. Murray*, 5 Wend. 148: "It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts with one exception agree in the opinion that the paper introduced, as to him, is no record. But if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiff in effect declares to the defendant—the paper declared on is a record, because it says you appeared; and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact." The opinion of the court in *Maxtin v. Gray*,

19 Kansas, 458 (27 Am. Rep. 149), contains an elaborate review of the authorities, and reaches the same conclusion.

It seems to be well settled that in an action on a judgment of a sister State, the defendant, notwithstanding the record shows a return by the sheriff of personal service, may contradict the return and show that no service was in fact ever made upon him, and that the judgment is therefore void. *Knowles v. Gas Light Co.*, 19 Wall. 58, and cases cited. On principle, there would seem to be no difference between the right to controvert the record when it comes from another State and a domestic record. By the Federal Constitution the judgment of the sister State is entitled to "full faith and credit"—no more and no less than domestic judgments.

Inasmuch as the defendant in the principal case failed to bring herself within the rules which would entitle her to relief, even if the right to controvert the return of the sheriff were conceded—as shown in the opinion of the court—she having failed to show that she had no actual notice of the proceeding or that she had a meritorious defense—the ruling of the court upon the conclusiveness of the return can scarcely be regarded as necessary to the decision, or as finally settling the question in Virginia

In *Fowler v. Mosher*, 85 Va. 421, a defendant in a chancery case was allowed, in the same proceeding, to controvert the return of the sheriff. The return recited service upon a member of the defendant's family. He was allowed to prove that in fact the person was not a member of his family.

MUMPOWER V. CITY OF BRISTOL.*

Supreme Court of Appeals: At Wytheville.

July 1, 1897.

1. STATUTE OF LIMITATIONS—*What causes survive—Damages resulting from suing out an injunction.* An action against a defendant for maliciously and without probable cause suing out an injunction against a plaintiff whereby the operation of his mill was suspended, is barred after one year from the dissolution of the injunction. In case of death the cause of action would not survive. The damages allowed to be recovered by or against a personal representative by sec. 2655 of the Code are direct damages to property and not those which are merely consequent upon a wrongful act to the person only.

Error to a judgment of the Circuit Court of the county of Washington, rendered October 9, 1896, in an action of trespass on the case, wherein the plaintiff in error was the plaintiff, and the defendant in error was the defendant.

Affirmed.

The opinion states the case.

* Reported by M. P. Burks, State Reporter.